that the expressman has complete control and that the shipper contracts solely with him argue against the justice of making the railroad responsible. And since the owner has a complete remedy against the expressman as a common carrier it would not seem advisable to tax principle in order to give him the additional remedy against the railroad. But whatever view is adopted with regard to express, the decision in *German Bank* v. *Ry. Co.*, *supra*, would seem to be the only sound holding in case of mail matter. Where there is no bailment there can not be a bailee for hire and the governmental questions involved preclude any idea of imposing a carrier's liability.

LIABILITY OF MUNICIPAL CORPORATIONS—The many and often conflicting decisions, defining and limiting the liabilities of municipalities for torts, have dealt with but one side of this subject, namely, the liability to members of the public. The other side—the liability to employees for injuries for which an individual or a private corporation would be answerable in civil actions, has been presented by two recent cases. *Peterson* v. *Wilmington*, (N. C. 1902) 40 S. E. 853, and *Caldwell* v. *Waterbury*, (Conn. 1902) 51 At. 530. The first held a city was not liable for injuries sustained by a fireman from the collapse of a defective reel, while the latter was even a stronger case, holding a municipality was not liable for injuries from defective machinery to an employee working upon material to be used in the construction of a street. As these decisions were based entirely upon the authority of cases exempting municipalities from liability for torts to members of the public, a short discussion of the principles involved in such cases is necessary to a thorough understanding of the result in the principal cases.

It is such a well-settled principle in the law of municipal corporations that a municipality is not liable for torts committed *ultra vires*—Dillon's Municipal Corporations, Ch. XXIII.,—that this discussion will be confined to torts committed by acts within the corporate power. This aspect of the question is involved in the greatest confusion. The better view—though by no means a universal one—recognizes a distinction between the liability of municipalities for acts of a governmental and legislative character, and for those of a private nature, and exempts the municipalities from liability in the first instance, while holding them to a strict liability in the latter. *Scott* v. *Mayor of Manchester*, (1857), 2 H. & N. 204; Dillon's Municipal Corporations, Sec. 948. The great difficulty, and the one occasioning all the confusion upon this subject, has been the application of this distinction. Each court has adopted its individual ideas of what is a governmental function and what a private one, until it has become almost impossible to lay down any rule of practical value for the determination of this question. The chaotic condition of this branch of the law is well represented by the statement of Mr. Justice FOOTE in *Lloyd* v. *Mayor*, (1851) 5 N. Y. 369, 375 that "All that can be done with safety is

to determine each case as it arises." But some order has been brought out of chaos by the opinion of Chief Justice GRAY in the leading case of *Hill* v. *Boston*, (1877) 122 Mass. 344. After an outline of the growth of the law of municipal corporations in both England and this country, the learned justice recognized the distinction between governmental and private functions and referred to the case of *Bailey* v. *Mayor*, etc., (N. Y. 1842) 3 Hill. 531, 539, as embodying the correct principle for its application. In this last case, Chief Justice NELSON said, "To this end regard should be had not so much to the nature and character of the various powers, as to the object and purpose of the legislature in conferring them. If granted for a public purpose exclusively, they belong to the corporate body in its public, political or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company." Applying this to the principal cases, it is clear the maintenance of fire departments and the construction of streets are governmental functions, and had the injuries been sustained by members of the public, there could have been no recovery in these actions.

But a further question arises, does the reason which exempts municipalities from liability for torts, committed in the exercise of governmental functions, where the suits are by members of the public, apply with equal force to actions by employees? Many reasons have been assigned for this exemption from suits by the public, but the better view is that it is an arbitrary exemption based upon public policy. Though no legislative body can delegate to another branch of the government the power to enact laws, this principle does not prevent conferring powers of local regulation upon local authorities. Cooley's Constitutional Limitations, pp. 137, 138. In a measure, then, a city in the exercise of governmental or political functions is performing the duties of a State and it is a fundamental principle of government that a State cannot be sued without its consent. "This is a privilege of sovereignty," said Chief Justice WAITE in *Railroad Co.* v. *Tennessee*, (1871) 101 U. S. 337, 339. The privilege is granted since, all the acts of a State being for the benefit of the public, it would be against public policy for the State to be liable for a failure to perform these acts, or for the manner in which they are performed. Any other view would bankrupt the State and render impossible the performance of the ordinary functions of a State. This exemption from suit applies with equal force whether the performance of these duties be vested in the State or conferred upon the city by the State. This, then, being the reason for the exemption of the city from suit in the discharge of governmental or legislative duties, it is immaterial whether the suit be by a member of the public or by an employee. There can be no liability in either case. As has been said above, there is but little authority upon the liability of municipal corporations to employees,—though that little, as represented by the recent case of *Hughes* v. *County of Munroe*, (1895) 147 N. Y. 49, is in accord

with the views expressed above. Here the question was squarely decided—and the county was exempted from liability in an action brought by an employee for injuries from defective machinery—though again the decision was based entirely upon the authority of cases deciding *only* that members of the public could not hold public corporations, like cities and counties, liable for torts committed in the discharge of governmental duties. It is safe to say, therefore, that wherever these cases arise the courts will be justified in deciding upon the authority of cases involving suits by members of the public, that municipal corporations are not liable to employees for torts committed in the performance of governmental and legislative duties.